UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DIANA BELL,

Plaintiff, 03 CV 9945 (KMW)(HBP)

-v- ORDER

PFIZER INC., PFIZER INC. STOCK AND INCENTIVE PLAN, PFIZER EMPLOYEE COMPENSATION AND MANAGEMENT DEVELOPMENT COMMITTEE, PFIZER INC. RETIREMENT ANNUITY PLAN, PFIZER INC. RETIREMENT COMMITTEE,

Defendants.

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WOOD, U.S.D.J.:

Plaintiff filed this action against defendants alleging, inter alia, claims for breach of fiduciary duty under Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), recovery of benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and promissory estoppel. Plaintiff moved to compel the production of sixteen documents – referred to as 1(a), 1(b), 2(a), 2(b), 2(j), 2(k), 2(l), 2(n), 3, 4, 5, 19, 20, 21, 22, and 24 in Defendants' privilege log – withheld by defendants on the grounds of attorney-client privilege and/or work-product protection. On July 1, 2005, Magistrate Judge Henry Pitman issued a Memorandum Opinion and Order ("Order"), familiarity with which is assumed,

granting Plaintiff's motion to compel to the extent of ordering Defendants to produce documents 1(a) and 1(b), but denying it in all other respects. Both parties have objected to parts of the Order.

I. Standard of Review

"Matters concerning discovery generally are considered 'nondispositive' of the litigation." Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990). Therefore, the Court reviews those parts of the Order to which the parties have objected to determine if they are "clearly erroneous or contrary to law." See 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); see also Abu-Nassar v. Elders Futures, Inc., No. 88 Civ. 7906, 1994 WL 445638, *4, 1994 U.S. Dist. LEXIS 11470, *12-*13 (S.D.N.Y. Aug. 17, 1994). Under this standard, "a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'" Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

"An objecting party may not raise new arguments that were not made before the Magistrate Judge." Robinson v. Keane, No. 92 Civ. 6090, 1999 WL 459811, *4, 1999 U.S. Dist. LEXIS 9766, *11

(S.D.N.Y. June 29, 1999). See also Rosello v. Barnhart, No. 02 Civ. 4629, 2004 WL 2366177, *3, 2004 U.S. Dist. LEXIS 21076, *8-*9 (S.D.N.Y. Oct. 20, 2004) (stating that plaintiff's objection was untimely because plaintiff did not raise the claim before the magistrate judge).

II. The Order's Findings and Conclusions

The sixteen documents in issue have dates ranging from August 18, 2003 through October 20, 2003; their subject matters are summarily described in defendant Pfizer's privilege log, as either "[s]tock options; retirement eligibility," "[s]tock plans; PRAP[1] documents," [s]tock options; PRAP documents," or "[s]tock plans; stock options, PRAP documents." See Order at 3; Pfizer Privilege Log, attached as Exhibit A to Declaration of Robert D. Kraus in Support of Plaintiff's Motion to Compel, dated October 13, 2004 ("Kraus Decl. 2004"), which is itself attached as Exhibit 2 to Declaration of Robert D. Kraus in Support of Plaintiff's Objections to the Discovery Order of Magistrate Judge, dated July 21, 2005 ("Kraus Decl. 2005"). Defendants claimed that all sixteen documents are protected by the attorney-client privilege, and nine are protected, as well, as attorney work products. See Order at 4; Pfizer Privilege Log, Kraus Decl.

[1] Pfizer Retirement Annuity Plan ("PRAP").

2004 Ex. A. According to the Order, "[n]o information [was] provided concerning the circumstances surrounding the preparation of any of the challenged documents." Order at 4.

The Order states that Plaintiff argued that Defendants' claim of privilege should be rejected because: 1) Defendants waived any privilege through their failure to serve an index of withheld documents in a timely manner; 2) Defendants were precluded from asserting the attorney-client privilege because of the fiduciary exception to that privilege; and 3) Defendants did not establish the work-product privilege. Id.

As to the second argument concerning the fiduciary exception to attorney-client privilege – which is the focus of both parties' objections – Magistrate Judge Pitman rejected Defendants' argument that the exception is inapplicable because Plaintiff is asserting her claim under Pfizer's Stock and Incentive Plan, which is not governed by ERISA and under which Defendants are therefore not fiduciaries. Magistrate Judge Pitman found that, although it is true that Plaintiff's claim involves the Stock and Incentive Plan, "the core issue in this case is plaintiff's eligibility for retirement under the Pfizer Retirement Annuity Plan," id. at 11, because Plaintiff's rights under the Stock and Incentive Plan are dependent on whether or not she was eligible to retire under the Retirement Annuity Plan,

id. at 8-13. Magistrate Judge Pitman therefore concluded that "to the extent that defendants argue that the fiduciary exception does not apply because plaintiff is asserting a claim under a non-ERISA stock option plan, their argument fails." Id. at 13. As to Defendants' argument that the fiduciary exception does not apply to communications relating to litigation, potential liability, or actions to protect the rest of the plan's participants, Magistrate Judge Pitman found that: 1) the record did not establish that the withheld documents related to litigation, because the Pfizer Privilege Log's sparse descriptions of the documents did not indicate this, and "none of defendants' submissions in response to the pending motion supplement[ed] the descriptions in the index," id. at 13-14; and 2) "defendants' arguments [that the fiduciary exception does not apply to communications relating to potential liability or actions to protect the rest of the plan's participants] come close to swallowing the fiduciary exception whole" because, at their most extreme, they "would shield almost all of a plan administrator's communications with an attorney that relate to or result in a denial of benefits," id. at 14-15. At the same time, Magistrate Judge Pitman recognized that "a trustee is obviously entitled to counsel once an adversarial situation has arisen questioning or challenging place decisions that have been made,"

id. at 15 (internal quotation marks omitted); he found that this interest could be reconciled with a plan beneficiary's competing interest "in disclosure of communications concerning plan administration" by looking either to "the purpose for which legal advice was sought" or "whether the communications occurred before or after the decision to deny benefits," id. at 15-16. Noting the dearth of information provided by defendants as to the nature of the communications at issue, Magistrate Judge Pitman found that "the date of defendants' decision to deny plaintiff retirement status must be deemed to be August 21, 2003, the date of the telephone conversation allegedly memorialized in defendants' letter dated August 22, 2003," and therefore concluded that the withheld documents created before August 21, 2003 – namely, documents 1(a) and 1(b)[2] – "fall within the fiduciary exception to the attorney-client privilege and must be produced," but that the other documents need not be produced. Id. at 17.[3]

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[2] Document 1(a) was created on August 18, 2003. Document 1(b) was created on an unknown date in August 2003, but Magistrate Judge Pitman construed the ambiguity against Defendants after noting that they bear the burden of proof when claiming the attorney-client privilege. Order at 17 n.6.

[3] Magistrate Judge Pitman also rejected Plaintiff's argument concerning waiver of privilege, id. at 4-8, but agreed that defendants failed to meet their burden of proof as to their claim of work-product privilege; but, because no document was claimed to be privileged solely on this basis, Magistrate Judge Pitman's

III. Plaintiff's Objections

Plaintiff objects to the Order's conclusion that none of the challenged documents apart from documents 1(a) and 1(b) must be produced. Plaintiff's objection is based on the argument that "Pfizer failed to meet its burden to show that the attorney client privilege applies." Plaintiff's Memorandum of Law in Support of Objections to Memorandum Opinion and Order of Magistrate Judge Dated July 1, 2005 ("Pl. Objections") 8. This argument was not fully presented to the Magistrate Judge. The Order states that, beyond asserting the fiduciary exception, "Plaintiff does not challenge the sufficiency of defendants' assertion of the attorney-client privilege in any other respect." Order at 8. Indeed, in her Memorandum of Law in Support of Plaintiff's Motion to Compel Pursuant to Fed. R. Civ. P. 37(a) ("Pl. Motion Mem."), Plaintiff argued: "Pfizer Cannot Invoke the Attorney Client Privilege on Matters of Plan Administration Under the Fiduciary Exception." Pl. Motion Mem. Point I. Although Plaintiff stated that "[t]he party seeking to invoke the privilege, in this case Pfizer, must establish the applicability of all elements of the attorney client privilege," and that "Pfizer's showing of these elements requires 'competent evidence and cannot be discharged by mere conclusory or ipse dixit

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rejection of the work-product protection did not alter his conclusion as to which documents must be produced, id. at 17-18.

assertions,'" id. at 7 (quoting Von Bulow v. Von Bulow, 811 F.2d 136, 146 (2d Cir. 1987)), Plaintiff then went on to "[a]ssum[e] for purposes of argument that Pfizer can introduce competent evidence to show the existence of each element of the attorney client privilege," id.,[4] rather than arguing that Defendants had failed to establish these elements.[5] In her reply submission, however, Plaintiff argued that "[b]ecause it has failed to submit any competent proof, Pfizer has plainly not met its burden of proof required to show that the Communications are privileged or that the fiduciary exception does not apply." Plaintiff's Memorandum of Law in Further Support of Plaintiff's Motion to Compel Pursuant to Fed. R. Civ. 37(a) ("Pl. Motion Reply Mem.") 4.

In short, in her submissions to Magistrate Judge Pitman, Plaintiff raised the issue of establishing the elements of the attorney-client privilege, but did not elaborate upon this issue by setting forth arguments as to how Defendants had not met those

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[4] See also Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Compel ("Defs. Motion Opp'n") 6 n.3 ("Plaintiff does not seriously contest that Pfizer has met the elements for invoking the attorney-client privilege, observing only that it is Pfizer's burden to establish each of the elements.") (citations omitted).

[5] Plaintiff also appeared to focus on the communications involving Eileen Lacamera, who authored seven of the communications that Plaintiff seeks to compel Defendants to produce, and Jim Milano, a Pfizer attorney. Pl. Motion Mem. 5-6.

requirements. Thus, it is understandable that the Order does not address such an argument. Nevertheless, the issue is not an entirely new one raised for the first time before the Court. Therefore, the Court will consider it.

Plaintiff argues that Magistrate Judge Pitman found that Defendants "had not met their burden to show that the Challenged Documents were privileged." Pl. Objections (emphasis omitted). Magistrate Judge Pitman did not make this finding as such: as noted above, the Order does not address the question of whether Defendants have shown that the withheld documents are protected by the attorney-client privilege, because Plaintiff did not fully argue that they do not. But the Order does repeatedly refer to the lack of information provided by Defendants concerning the withheld documents. See Order at 14 n.4 (stating, as to Defendants' argument that the fiduciary exception does not apply to communications regarding litigation, that the party claiming the protection of a privilege bears the burden of establishing it and "the absence of evidence concerning the documents constitutes a failure of the defendants to meet their burden of proof"); id. at 4 ("No information has been provided concerning the circumstances surrounding the preparation of any of the challenged documents"); id. at 16 ("neither defendants' index nor their submissions in response to this motion suggest that the

communications were made to defend against plaintiff's claim nor do they delineate when defendants determined that plaintiff's separation from Pfizer was a termination and not a resignation"); id. at 18 (noting that Defendants have not sustained their burden of proof as to their claim of work-product privilege because "defendants have provided no evidence whatsoever concerning the circumstances leading to the creation of the challenged documents").

"The burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting it." United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 119 F.3d 210, 214 (2d Cir. 1997). Such a burden "is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." von Bulow v. von Bulow, 811 F.2d 136, 146 (2d Cir. 1987) (internal quotation marks and citation omitted).

> The broad outlines of the attorney-client privilege are clear: "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal

> advisor, (8) except the protection be waived." In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1036 (2d Cir.1984) (internal quotation marks omitted).

International Broth. of Teamsters, 119 F.3d at 214. See also United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996) ("To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice."). The attorney-client privilege encompasses "both information provided to the lawyer by the client and professional advice given by an attorney that discloses such information." In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992) (citing Upjohn Co. v. United States, 449 U.S. 383, 390 (1981)). But "[t]he fact that a document is sent or received between attorney and client does not make it privileged unless it contains confidential communications relating to legal advice." Grossman v. Schwarz, 125 F.R.D. 376, 387 (S.D.N.Y. 1989); see also In re Christensen, No. M19-138, 2006 WL 278169, *1, 2006 U.S. Dist. LEXIS 11779, *2-*3 (S.D.N.Y. Feb. 3, 2006) ("Communications between attorney and client not privileged in their own right; instead, '[t]he document must contain confidential communication relating to legal advice.'

Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.), 139 F.R.D. 295, 300 (S.D.N.Y. 1991)."). "To facilitate its determination of privilege, a court may require 'an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.'" Construction Products Research, Inc., 73 F.3d at 473 (quoting Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 474 (S.D.N.Y. 1993)). "The privilege log should: 'identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure,'" with "'[o]ther required information . . . typically supplied by affidavit or deposition testimony.'" Construction Products Research, Inc., 73 F.3d at 473 (quoting Bowne, 150 F.R.D. at 474). See also Fed. R. Civ. P. 26(b)(5) (requiring that party claiming that otherwise discoverable information is privileged "shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection").

Defendants stated in their submissions to the Magistrate Judge, in passing, that they have met their burden of

establishing all the elements of the attorney-client privilege, "as demonstrated by [Pfizer's] privilege log, extensive correspondence and this opposition." Def. Motion Opp'n 6 n.3. And in their response to Plaintiff's objections, Defendants argue that Magistrate Judge Pitman did not err in "recognizing the existence of the attorney-client relationship between Ms. Lacamera and Mr. Milano." Defendants' Response to Plaintiff's Objections to Memorandum Opinion and Order of Magistrate Judge Dated July 1, 2005 ("Def. Resp.") 3.

As the Order notes, however, the information concerning the withheld communications is sparse. The withheld documents are communications involving the following authors and recipients, in various combinations (as well as individuals "cc'ed" on the communications): E. Lacamera, J. Gates, J. Milano, N. Weiss, J. Benson, and G. Colon. Pfizer Privilege Log, Kraus Decl. 2004 Ex. A. The privilege log does not provide the titles or roles of these individuals. However, the record indicates that, at the relevant times, E. Lacamera was a Manager, Stock Option & Savings Plan Administrator, see Kraus Decl. 2004 Ex. E, and J. Milano was an attorney in the employment law group, see Kraus Decl. 2004 Ex. J (58:17-21). It appears undisputed that J. Gates was the Director of Compensation Benefits. See Pl. Motion Mem. 5. Defendants claim, without evidentiary support, that N. Weiss and

J. Benson are "two Pfizer counsel."[6] Def. Motion Opp'n 4 n.2. Finally, the role or title of G. Colon does not appear to be set forth in the record before the Court. As for the context of the withheld communications, they occurred, according to the Privilege Log, between August 18, 2003, the date on which Plaintiff called to inquire as to why her stock options had expired (or were soon to expire) – or, in Plaintiff's characterization, "why Pfizer had retroactively cancelled her stock options," Pl. Motion Mem. 3[7] – and October 20, 2003, about a month before this action was filed. Defendant notes specifically that Lacamera testified, in her deposition, that she spoke with Milano after speaking with Plaintiff, and thereafter communicated to Plaintiff Pfizer's position as to Plaintiff's inquiry concerning her stock options. Def. Resp. 4; Kraus Decl.

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[6] It should be noted that for a few of the withheld communications (2(n) (from Milano to Benson) and 22 and 24 (from Milano to Weiss)), both the author and recipient appear to be Pfizer counsel; however, Lacamera and Gates were "cc'ed" on these communications.

[7] In her briefing below, Plaintiff stated - in the context of arguing that the communications are subject to the fiduciary exception even if they are protected by the attorney-client privilege - that the communications "arose out of and followed on the heels of [Plaintiff's] complaint, on August 18, 2003, that she had received a document that was thoroughly at odds with Pfizer's earlier written representations that she was eligible for early retirement under the Retirement Plan and would receive retiree eligible treatment of her stock options." Pl. Motion Mem. 9.

2004 J (58-60). Defendants also point to Plaintiff's letter of August 26, 2003, stating that Plaintiff would pursue litigation if Pfizer did not resolve the dispute. Def. Resp. 4 (citing letter attached as Exhibit V to Declaration of Peter J. Engstrom in Support of Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Compel, dated October 19, 2004).[8]

The Court is not satisfied that, on the record before it as described above, Defendants have borne their burden of establishing all of the elements of the attorney-client privilege as to the withheld communications, apart from documents 1(a) and (b). As to documents 1(a) and (b), the information concerning their author and recipient, and their context and general purpose as described in the deposition testimony of Lacamera, establishes that they are protected by the attorney-client privilege. However, as to the other documents, the fact that their authors and/or recipients appear to be attorneys and non-attorneys at Pfizer, and the timing of these communications, are not sufficient, without more, to establish that they were confidential communications for the purpose of obtaining or

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[8] Defendants claim that, in their August telephone calls with Lacamera, Plaintiff and her husband were "threatening litigation against Pfizer." Def. Motion Opp'n 4. But this claim is unsupported; Defendants base it simply on the fact that Lacamera wrote down "detrimental reliance" in her notes from the conversation she had with Plaintiff and her husband. Id.; Kraus Decl. 2004 Ex. I.

giving legal advice. Cf. Construction Products Research, Inc., 73 F.3d at 473-74 (finding privilege log deficient because it "contain[ed] a cursory description of each document, the date, author, recipient, and 'comments,'" and concluding that it did "not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation"). However, in light of the fact that, as already discussed, Plaintiff did not fully present this argument to Magistrate Judge Pitman, the Court will reserve decision as to whether these communications are privileged pending its review of further submissions. The Court directs Defendants to produce, no later than September 13, 2006, a more detailed privilege log, along with affidavits setting forth facts supporting their claim of attorney-client privilege – including the identities, titles, and roles of the authors, recipients, and individuals cc'ed on these communications, and the purpose of the communications.

If, after a review of the additional submissions, the Court finds that Defendants have met their burden of establishing that all of the withheld communications are protected by the attorney-client privilege, then Plaintiff's motion to compel will be denied as to those documents, as directed by Magistrate Judge Pitman, because Plaintiff does not object to Magistrate Judge Pitman's conclusion that those documents do not fall under the

fiduciary exception to the attorney-client privilege.

IV. Defendants' Objections

Because the Court has found that documents 1(a) and (b) are protected by the attorney-client privilege, the Court turns to Defendants' objections to the Order's conclusion that Plaintiff's motion to compel must be granted as to documents 1(a) and (b) - handwritten notes by Lacamera of discussions she had with Milano - on the basis of the fiduciary exception to attorney-client privilege. Defendants argue that: 1) the fiduciary exception to the attorney-client privilege applies only to fiduciary matters, and the communications between Lacamera and Milano were not fiduciary in nature because a) Lacamera is not a fiduciary under the Pfizer Retirement Annuity Plan – rather, only Pfizer's Retirement Committee is charged with administering the Plan and has fiduciary responsibility under ERISA, b) even if Lacamera were a fiduciary, she did not act in the capacity of an ERISA fiduciary when she spoke with Milano because she, at most, investigated Plaintiff's claim regarding her stock options and did not perform a discretionary task, c) the same holds for Milano, and d) the subject of Plaintiff's claims, which Lacamera looked into, were stock options, not retirement benefits. Defendants' Objections to the Magistrate Judge's Memorandum

Opinion and Order Dated July 1, 2005 ("Def. Objections") 4-9. In addition, Defendants contend that, even if the fiduciary exception were applicable here, it would not apply to these specific communications between Lacamera and Milano because they relate to litigation or potential liability. Id. at 9-13.

It was not clearly erroneous or contrary to law for Magistrate Judge Pitman to conclude that Defendants' argument fails insofar as Defendants assert that the fiduciary exception necessarily does not apply to the withheld communications because Plaintiff's claim pertains to a non-ERISA stock option plan. As noted in the Order, and as recognized by Defendants, Plaintiff's rights under the Stock and Incentive Plan are dependent on whether or not she was eligible to retire under the Retirement Annuity Plan, id. at 8-13, and documents 1(a) and (b) appear to involve communications about the latter point. Furthermore, Defendants' specific arguments as to Lacamera's and Milano's roles and functions (both generally and when they participated in the withheld communications) – and their implied claim that only communications involving the Retirement Committee would potentially be subject to the fiduciary exception - were not presented to the Magistrate Judge; thus, this Court need not consider them. Even if the Court were to consider these arguments, however, they are moot, for the reason discussed

below.

The Court finds, however, the Order's conclusion that "the date of defendants' decision to deny plaintiff retirement status must be deemed to be August 21, 2003, the date of the telephone conversation allegedly memorialized in defendants' letter dated August 22, 2003," Order at 17, to be mistaken on the face of the entire record.[9] It is certainly true that, as noted by the Order, the Defendants' index and submissions do not state when Defendants took the position that Plaintiff had not "retired" under the Pfizer Retirement Plan. Order at 16. But this determination by Defendants must presumably have taken place before Pfizer took the action, concerning Plaintiff's stock options, of which Plaintiff complained when she spoke to

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[9] Defendants object to this specific finding in the Order only in a footnote in their submissions to this Court, see Def. Objections 12 n.4. Their objection is focused, instead, on their argument that the communications in 1(a) and (b) pertained to litigation. The Court does not find that Magistrate Judge Pitman erred in finding that the parties' submissions do not indicate that any of "the communications were made to defend against plaintiff's claim," Order at 16 – particularly documents 1(a) and 1(b), which were created before August 21, 2003. As noted earlier, there is no evidence supporting Defendants'claim that, in their August telephone calls with Lacamera, Plaintiff and her husband were threatening litigation against Pfizer. See supra note 8. Plaintiff's two letters dated August 26, 2003, stating that Plaintiff would pursue litigation if Pfizer did not resolve the dispute, Def. Objections 11-12 (citing letters attached as Exhibits V and W to Declaration of Peter J. Engstrom in Support of Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Compel, dated October 19, 2004 ("Engstrom Decl.")), are subsequent to the communications in documents 1(a) and (b).

Lacamera, and of which she was first notified on August 15, 2003, see Letter from Diana Bell to Pfizer Inc., dated August 26, 2003, Engstrom Decl. Ex. W. Indeed, as has been discussed at length both in Magistrate Judge Pitman's Order and this Order, it is on this determination by Pfizer that the treatment of Plaintiff's stock options hinges. The August 21, 2003, conversation appears to have been the first time Plaintiff was informed of this determination, but not the date of the determination itself. Therefore, under the approach taken by the Order, the fiduciary exception does not extend to documents 1(a) and (b), insofar as they pertain to communications that occurred after Pfizer's determination that Plaintiff had not "retired."

V. Conclusion

For the reasons set forth above, the Court concludes that the Order clearly erred in concluding that documents 1(a) and (b) must be produced. The Order is therefore set aside insofar as it grants Plaintiff's motion to compel to the extent of ordering Defendants to produce documents 1(a) and 1(b). As for the other withheld documents at issue, the Court directs Defendants to produce, no later than September 13, 2006, a more detailed privilege log, along with affidavits setting forth facts supporting their claim of attorney-client privilege – including

the identities, titles, and roles of the authors, recipients, and individuals copied on these communications, and the purpose of the communications.

SO ORDERED.

Dated: New York, New York
August 31, 2006

Kimba M. Wood
United States District Judge